No. 1

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FEMI BOGLE-ASSEGAI,
Petitioners,
v.
STATE OF CONNECTICUT, COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, CYNTHIA WATTS-ELDER, LEANNE APPLETON, AND DONALD NEWTON
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit Court of Appeals committed reversible error when it ruled that a Plaintiff who, in a deferral state, files a charge of discrimination under Title VII of the Civil Rights Act of 1964 with the E.E.O.C. within 300 days of the alleged discriminating act, is prohibited from pursuing her claim in federal court when, unknown to Plaintiff, the E.E.O.C. may not have cross-filed the charge with the local deferral agency?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioner here and appellant below is Femi Bogle-Assegai. She brings this action on her own behalf.

The appellees below and respondents here are State of Connecticut, Commission on Human Rights and Opportunities, Cynthia Watts-Elder, Leanne Appleton, and Donald Newton.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

PARTIES TO THE PROCEEDING..... ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....1

STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE.....5

A. Factual background.....5

B. Proceedings below.....7

REASONS FOR GRANTING THE PETITION ..10

A. The Court of Appeals Decision Undermines this Court's decisions in *E.E.O.C. v. Commercial Office Product, Love v. Pulliam*, and *Mohasco Corporation v. Silver* 10

B. Even in the Absence of the Work-sharing Agreement, the E.E.O.C. was obligated to forward Bogle-Assegai's Charge when received to the C.H.R.O.....16

C. The Court of Appeals Decision Undermines this Court's Decision in *Zipes v. Trans World Airline*, as the doctrine of equitable tolling should have been applied to find the charge timely filed.....19

D. The Court of Appeals Decision Works To Manifest Injustices, contrary to this Court's Decision in *Singleton v. Bureau of Medical Services*.....22

CONCLUSION.....26

APPENDIX

Appendix A (Order Denying Petition for En Banc Hearing (January 31, 2007)

Appendix B (Opinion and Order for Case No. 05-1858 (November 29, 2006)

Appendix C (Judgment of District Court Granting Motion for Summary Judgment (March 10, 2005)

TABLE OF AUTHORITIES

CASES:

Atwood v. Kleberg, 163 F.2d 108 (5th Cir. 1947) 18

Bisk v. Soko Co., Ltd., No. 98 CV-184, 2000 U.S. Dist. LEXIS 9798 *16 (N.D.N.Y. July 7, 2000) 14

E.E.O.C. v. Commercial Office Products, 486 U.S. 107 (1988).....10, 11, 15, 24

E.E.O.C. v. Techalloy Maryland, Inc., 894 F.2d 676 (4th Cir. 1990).....23

Ford v. Bernard Fineson Development Center, 81 F. 3d 304 (2nd Cir. 19).....14, 15, 16

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 14

Hormel v. Helvering, 312 U.S. 552, 557 n. 8 (1941) 23

Laquaglia v. Rio Hotel & Casino, Inc.,186 F.3d 1172 (9th Cir. 1999) 24

Love v. Pullman Co., 404 U.S. 522 (1972) 12, 13, 17, 18, 22

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 19

Singleton v. Bureau of Medical Services, 428 U.S. 106 (1976)..... 23

Smith v. McGinnis, 208 F. 3d 13 (2d Cir. 2000) 20

Zipes v. Trans World Airlines, 455 U.S. 385 (1982).....19, 21, 22

STATUTES:

42 U.S.C. § 2000e-5(c) 9, 17

29 C.F.R. § 1601.13 (a) (3) (iii) 17

29 CFR §§ 1601.13(a)(4)(ii), 1626.10(c) 11, 13

29 C.F.R. §§ 1601.70, 1601.74, 1601.80 11

Conn. Gen Stat. 46a-54 et seq 11

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals (App. A) is reported at 470 F.3d 498 (2d Cir. 2006).

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1) states:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

2. 29 C.F.R. § 1626.10 Agreements with State or local fair employment practices agencies.

(a) Pursuant to sections 6 and 7 of the ADEA and section 11(b) of the FLSA, the Commission may enter into agreements with State or local fair employment practices agencies to cooperate in enforcement, technical assistance, research, or public informational activities, and may engage the services of such agencies in processing charges assuring the safeguard of the Federal rights of aggrieved persons.

(b) The Commission may enter into agreements with State or local agencies which authorize such agencies to receive charges and complaints pursuant to § 1626.5 and in accordance with the specifications contained in §§ 1626.7 and 1626.8.

(c) When a worksharing agreement with a State agency is in effect, the State agency will act on certain charges and the Commission will promptly process charges which the State agency does not pursue. Charges received by one agency under the agreement shall be deemed received by the other agency for purposes of § 1626.7.

3. 42 U.S.C. § 2000e-8. Investigations

(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services;

payment in advance or reimbursement; agreements and rescission of agreements.

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

STATEMENT OF THE CASE

This case presents questions about whether a recognized state deferral agency may disavow its work-sharing agreement with the Equal Employment Opportunity Commission without notice and to the detriment of employment discrimination complainants. This question has not been directly addressed by this Court but presents an issue of profound national importance. The interstices of this Court's decisions in *E.E.O.C. v. Commercial Office Products*, *Love v. Pullman Co.*, and *Zipes v. TWA*, lead to the conclusion that the statutory framework within which Title VII complaints are handled cannot be selectively manipulated to abrogate the rights of complainants.

I. FACTUAL BACKGROUND

The recitation of facts by the Court of Appeals fails to state that Bogle-Assegai would likely have prevailed on the merits because the operative facts supporting the claim were *admitted* by Defendants in their own pleadings.

Bogle-Assegai was hired as an investigator for the Connecticut Commission on Human Right and Opportunities, the state deferral agency charged with investigating and remedying complaints of employment discrimination. She was later promoted to the position of Regional Manager in 1997 by former agency Executive Director, Louis

Martin. A strong atmosphere of racial tension existed at the C.H.R.O. because of perceived or actual racial discrimination by Martin.

Defendant Cynthia Watts-Elder assumed the Executive Director position with the stated intention of "shaking up the agency", to make changes in management at C.H.R.O. from "top to bottom", and ending the "climate of racial tension within the agency and favoritism toward African-Americans in hiring and promoting". In their answer to the complaint, Defendants *admit these statements* by Watts-Elder. (SA-38, ¶ 20; SA-256, ¶¶ 19, 20)

Further, in answer to the complaint Defendants *admit* their belief that "plaintiff was promoted as part of a concerted effort by the then Executive Director to discriminate against white employees." (SA-255, ¶ 14). Finally, in answer to the complaint ¶ 27 Defendants *admit* that "commencing in October and November 2000 Defendant Watts-Elder, aided and abetted by Newton, the C.H.R.O. Chief of Field Operations, began a concerted effort of spying on Plaintiff, using Waterbury staffers and the building's swipe card records, to affirm and justify a claim of "stealing" state time. At least one representative of the Attorney General's office, being Attorney David Teed, was involved in this effort." (SA-257). Thus, taking these three *admissions* by Defendant, Plaintiff would likely have prevailed on the merits of her claim that the Defendants targeted Plaintiff as

a "Martin Hire" believed to have been discriminatorily promoted, and concocted a scheme as a pretext to discharge her.

Because she was employed as a Regional Manager for the Defendant, the state deferral agency, Bogle-Assegai was thoroughly familiar with the informal manner in which extensions of the work-sharing agreements between the E.E.O.C. and the C.H.R.O. were handled.

On October 1, 2001 Plaintiff filed her charge of discrimination with the E.E.O.C., 186 days after her notice of termination of employment. Bogle-Assegai did not file with the state deferral agency, C.H.R.O. Plaintiff chose to file directly with the E.E.O.C. because the deferral agency was her employer, alleged to have engaged in the discriminatory and retaliatory conduct. The E.E.O.C. accepted jurisdiction of the charge and issued a right to sue letter to Bogle-Assegai.

II. PROCEEDINGS BELOW

A. The District Court

On October 1, 2001 Bogle-Assegai filed an employment discrimination complaint against C.H.R.O. and several of its employees with the Equal Employment Opportunity Commission ("E.E.O.C.") pursuant to Title VII of the Civil Rights Act of 1964. In her complaint, Bogle-

Assegai alleged that she had been subjected to unlawful discrimination based upon her race, color, national origin and religion. A "no cause" finding was issued by the E.E.O.C. on September 17, 2002. The federal court action commenced on December 24, 2002. Defendants contended before the District Court, inter alia, that the matter should be dismissed upon summary judgment because the charge was not timely, not being filed within 180 days. On March 10, 2005 the District Court granted Defendants' motion for summary judgment.

B. The Court of Appeals

On appeal to the Second Circuit Court Bogle-Assegai requested that the Court take judicial notice of the work-sharing agreement between E.E.O.C. and C.H.R.O. that permitted dual filing. In response, Defendants contended for the first time that the work-sharing agreement had expired on October 1, 2001 when Bogle-Assegai filed her charge. In a three judge panel decision the Court of Appeals ruled that Bogle-Assegai had not filed a timely charge within 180 days, that there was insufficient evidence to support the existence of a work-sharing agreement at the time of her charge being filed, and that Bogle-Assegai had failed to explain why her arguments regarding the applicability of the work-sharing agreement had not been made at the district court level.

The Court of Appeals disagreed with Plaintiff's reliance upon 42 U.S.C. § 2000e-5, which provides for the 180-day filing period and the 300-day filing period in deferral states, as sufficient to raise the issue for all subsequent purposes. Rather, the Court held that "the mere citation to a statute that provides alternative filing periods, the applicability of each turning on whether the EEOC has or does not have a work- sharing agreement with the state agency, does not constitute an assertion that there in fact existed such an agreement at the pertinent time and that the longer period applies".

Further, the Court held that "Bogle-Assegai, in filing her administrative charge 186 days after her receipt of the Termination Letter, cannot be found to have relied on the existence of a work-sharing agreement".

Bogle-Assegai filed a request for a rehearing en banc on December 12, 2006. Her request for an en banc hearing was denied. This petition then followed.

III. THIS CASE PRESENTS ISSUES OF FUNDAMENTAL NATIONAL IMPORTANCE.

Although this case presents specific legal issues, it is fundamentally a case about whether the remedial purposes of Title VII may be thwarted by

state deferral agencies at the expense of employment discrimination complainants. The fundamental question is whether discrimination complainants may be penalized when, unknown to the public, there is an alleged lapse in the work-sharing agreement between the E.E.O.C. and a state deferral agency. This Court has previously said that Title VII of the Civil Rights Act of 1964 was intended to provide broad remedial relief to discrimination complainants. This proposition is tested in this case, where the decision of the Appeals Court has introduced a high level of instability into a regulatory scheme that is intended to be "user friendly".

IV. REASONS FOR GRANTING OF THE PETITION

A. The Court of Appeals Decision Undermines this Court's Decisions in E.E.O.C. v. Commercial Office Products, Love v. Pulliam, and Mohasco Corporation v. Silver.

Although this Court's decision in *E.E.O.C. v. Commercial Office Products*, 486 U.S. 107 (1988) did not decide the precise issue here presented, its reasoning provides significant guidance.

As part of the statutory and regulatory scheme that has been developed for enforcement of Title VII claims of discrimination, the E.E.O.C. has

been authorized to enter into work-sharing agreements with state and local fair employment practices agencies, also known as deferral agencies. 29 CFR §§ 1601.13(a)(4)(ii), 1626.10(c). As noted in *E.E.O.C. v. Commercial Office Products,* the E.E.O.C. has entered into such work-sharing agreements with approximately three-quarters of the 109 state and local agencies authorized to enforce state and local employment discrimination laws. This fact was found to be a matter of "substantial importance" to the matter of discrimination charge processing. Work-sharing agreements for the processing of discrimination complaints have become a fixed part of the statutory and regulatory framework for Title VII complaint processing. Once the statutory and regulatory framework is established by the E.E.O.C. entering into a work-sharing agreement with a state agency that is empowered to investigate and remedy discrimination claims, parties such as Bogle-Assegai come to rely upon the existence of this regulatory framework.

Because Connecticut has a fair employment practice law and has established a state agency that is empowered to act against unlawful employment practices, the C.H.R.O. qualifies as a state deferral or "706" agency. *See* Conn. Gen Stat. 46a-54 et seq; 29 C.F.R. §§ 1601.70, 1601.74, 1601.80 (1990). Thus, Connecticut is a "deferral" state, which gives a complainant the benefit of a 300-day filing period under Title VII.

The precise issue is whether, in a deferral state with a recognized 706 agency, an otherwise timely filed charge by a discrimination complainant can be defeated because of an alleged lapse in the work-sharing agreement where there has been no notice given to the public by the 706 agency or the EEOC of the alleged lapse.

Contrary to the rationale of the Second Circuit Court of Appeals, Bogle-Assegai reasonably relied upon the existence of the work-sharing agreement and the dual processing of charges by E.E.O.C. and the C.H.R.O. Bogle-Assegai was a Regional Manager for the state deferral agency, the C.H.R.O., and thus was well aware of the existence of the work-sharing agreement.

As this Court observed in *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972): "To require a second filing by the aggrieved party . . . would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." The rationale of the Second Circuit Court essentially would require discrimination complaints in Connecticut to file a second charge with the C.H.R.O. in the happenstance that there was some unknown and unannounced lapse in the work-sharing agreement. To require a discrimination complainant to protect herself against the E.E.O.C.'s possible violation of

its own regulations by simultaneously filing a charge with the appropriate state agency would be wholly inconsistent with the rationale of *Love v. Pullman*.

What the record in this case establishes is that discrimination complainants who timely file with the E.E.O.C. in a deferral state may nonetheless have their complaint dismissed when, unknown to any member of the public, that deferral agency suddenly discovers, or decides, that there was some momentary lapse in the work-sharing agreement. Some notice must necessarily be provided to the public before the established regulatory framework is dismantled in this manner.

The plain language of the regulations of E.E.O.C. also militate in favor of a finding that Bogle-Assegai's charge was timely filed. At 29 C.F.R. § 1601.13 (a) (4) (ii)(A) and (B) charges are deemed timely if filed within 300 days of the alleged violation. The plain language appears to relate solely to whether the fair employment practices agency has or has not waived its rights of exclusive processing of the charge.

In the instant case if the lapse in the written agreement indeed went unnoticed for at least two months, it is obvious that the parties to the agreement intended and continued to act for all material purposes as though the agreement continued. This is the very sort of "bureaucratic

error" cautioned against by the Second Circuit in *Ford v. Bernard Fineson*, 81 F. 3d 304, 312 (2nd Cir. 1996). Moreover, it is clear in the instant case that any cessation in the work-sharing agreement was technical and temporary. The deferral agency continued at all times to receive and to process charges. Even under general contract law, a contract may be found to exist where the parties to the agreement engage in a course of conduct that suggests an agreement. *Bisk v. Soko Co., Ltd.*, No. 98 CV-184, 2000 U.S. Dist. LEXIS 9798 *16 (N.D.N.Y. July 7, 2000). There is no record evidence that either E.E.O.C. or C.H.R.O. changed their course of dealings with each other during the dates leading up to or subsequent to Plaintiff's filing of her charge. At all times material, the two agencies continued to operate to the public as though the work-sharing agreement remained in effect. This Court has said that "[e]quity eschews mechanical rules; it depends upon flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). The Court of Appeals has engaged in the mechanical application of the Title VII filing rules, without the required flexibility under these circumstances. This mechanical application creates a precedent that is harmful not only to Bogle-Assegai but to all discrimination complainants in deferral states.

"Work-sharing Agreements are much more like government regulations than any sort of contract, since they are agreements between

governmental agencies, are authorized by specific statutory provisions, and have been adopted by federal regulations as an integral part of the regulatory scheme. In a sense, they are localized subsets of federal regulations. In addition, these two-party "agreements" are principally intended to benefit third parties: the claimants who appear before the agencies....They therefore have the same impact on claimants as a statute or regulation." *Ford v. Bernard Fineson, Id.* at Footnote 5.

As noted by this Court in *EEOC v. Commercial Office Products*, the effect and operation of the work-sharing agreements is a question "of substantial importance because the EEOC has used its statutory authority to enter into work-sharing agreements with approximately three-quarters of the 109 state and local agencies authorized to enforce state and local employment discrimination laws." *Id* at 112

This Court has emphasized that Title VII is a "remedial scheme in which lay-persons rather than lawyers, are expected to initiate the process". *EEOC v. Commercial Office Products Id.* at 124. There is a recognized "need for predictability in a statutory scheme intended to be user-friendly." "It is already difficult enough to understand the deadlines for filing Title VII claims. Claimants who master the intricacies of these deadlines have the right to expect that they will not be penalized by

a bureaucrats noncompliance with the Work-sharing Agreement." *Ford v. Bernard Fineson, Id* at 312.

As noted by the Second Circuit Court of Appeals, "the timeliness of a claimant's filing . . . should not be made to depend on whether one or the other agency follows through on its undertakings under a Work-sharing Agreement". *Ford v. Bernard Fineson, Id* at 312. Making an individual's rights dependent upon such happenstance is not consistent with a document that is designed to promote efficiency and coordination. The work-sharing agreement that existed between the E.E.O.C. and C.H.R.O. at least as of September 30, 2001 and again by November 25, 2001 should not be read to require a discrimination complainant to second guess whether the agreement was in effective on October 1, 2001 when Bogle-Assegai filed her charge.

B. Even in the Absence of the Work-sharing Agreement, the E.E.O.C. was obligated to forward Bogle-Assegai's Charge when received to the C.H.R.O.

By filing Title VII charges with the E.E.O.C., Bogle-Assegai, as well as any other discrimination complainant, legally obligated the E.E.O.C. to transmit a copy of her charges to the state deferral agency, in this instance, the C.H.R.O. Title VII grants to state deferral agencies the exclusive right to process allegations of

discrimination occurring within that state for a period of sixty days. See 42 U.S.C. § 2000e-5(c). In order to comply with this statutory mandate, the E.E.O.C. has undertaken through *regulations* the duty to transmit a copy of all Connecticut Title VII charges to the C.H.R.O. See 29 C.F.R. § 1601.13(a) (3). The E.E.O.C. is required to send copies of charges to the C.H.R.O. even when the state deferral agency has waived its right to the period of exclusive processing. Under 29 C.F.R. § 1601.13 (a) (3) (iii), which governs work-sharing agreements, dual filing is not an option. Rather, it is a requirement.

Because the Supreme Court has held that the E.E.O.C. may initiate state proceedings on behalf of the discrimination complainant, see *Love v. Pullman Co., Id.* a complainant who files with the E.E.O.C. need not take any further action to ensure that her charges will be dual filed with the state deferral agency. The record reveals that at all times Connecticut was a deferral state; thus the 300-day filing period applied. By operation of the regulations, even in the absence of the work-sharing agreement, Bogle-Assegai's complaint must be deemed to have been forwarded to C.H.R.O. on October 1, 2001, the date it was received by E.E.O.C. Thus, Bogle-Assegai's complaint must be deemed to have been received by E.E.O.C. and C.H.R.O., well within the 300 days allowed by the regulations for deferral states.

No evidence exists that the E.E.O.C. failed to transmit Bogle-Assegai's charges. In the absence of such evidence, this Court must presume that the E.E.O.C. fulfilled its legal obligation. See *Atwood v. Kleberg*, 163 F.2d 108, 113 (5th Cir. 1947) ("it will be presumed that persons charged with the performance of a duty have discharged it fairly and in accordance with their commission until evidence is introduced which overthrows this presumption").

If the E.E.O.C. failed to forward the charge such failure should not prejudice Bogle-Assegai, who filed her charges with enough time for the E.E.O.C. to accomplish a timely state filing, and timely state consideration. The purpose of the statute is "to give state agencies a prior opportunity to consider discrimination complaints." *Love v. Pullman Co.*, *supra*, at 526. Since Plaintiff's charge was filed with the E.E.O.C. on day 186, the state agency had ample opportunity to consider the charge, and 60 days later the charge could have been considered by the E.E.O.C. In any event, any mistake in filing with the appropriate agency would have been due to the failure of E.E.O.C. to forward Bogle-Assegai's charge to the C.H.R.O. or to inform her that she was required to file directly with the C.H.R.O. herself. Had Bogle-Assegai known of the alleged lapse in the work-sharing agreement as of October 1, 2001 she could have immediately filed her charge directly with the C.H.R.O. and thus had a timely filing with both agencies within the 300 day filing period. In a

deferral state where there is no work-sharing agreement, a complainant need only file with the state deferral agency no later than day 240 after notice of the alleged violation. *Mohasco Corp. v. Silver*, 447 U.S. 807, 816, n. 16 (1980).

Furthermore, the E.E.O.C. issued to Plaintiff a right to sue letter. The E.E.O.C. would not have issued the letter if it did not have jurisdiction, or if it considered Plaintiff's charge to have been untimely.

C. The Court of Appeals Decision Undermines this Court's Decisions in *Zipes v. Trans World Airlines*, as the Doctrine of Equitable Tolling Should Have Been Applied To Find the Charge Timely Filed

Alternatively, the Court of Appeals should have applied the doctrine of equitable tolling in order to find Bogle-Assegai's charge timely filed. In *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982) this Court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling". By so finding, this Court stated its intent to "honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer". *Id.* at 398. Since *Zipes v Trans World Airlines*, courts have consistently held that the charge-filing requirement, which is not a

jurisdictional prerequisite to suit, should be interpreted flexibly to achieve the statutory purposes.

To refuse to equitably toll the charge-filing period under the circumstances of the instant case unfairly punishes complainants seeking to file charges of discrimination and undermines the remedial purpose of Title VII.

All necessary elements for application of equitable tolling have been met in the instant case. Bogle-Assegai (1) acted with reasonable diligence during the time period she seeks to have tolled, and (2) has proved that the circumstances are so extraordinary that the doctrine should apply. *Smith v. McGinnis*, 208 F. 3d 13, 17 (2d Cir. 2000). The facts in the instant case are not the garden variety "excusable neglect" but rather demonstrate circumstances clearly beyond the ability of Bogle-Assegai to take appropriate action. The claim was filed on day 186 with the E.E.O.C. rather than the state deferral agency, *the employer alleged to have engaged in the discriminatory termination* of Bogle-Assegai. Plaintiff had no way of knowing that the E.E.O.C. might not comply with the statute and not forward the charge to the state agency.

Not only is this case a matter of individual concern to Bogle-Assegai but every discrimination complainant in a deferral state where there is a claim that the established regulatory framework has

been "dismantled" without prior notice to the public. Such complainants should be permitted to avail themselves of the doctrine of equitable tolling to avoid the dismissal of their charge when filed within the 300 day period. A refusal to allow the application of equitable tolling under these circumstances undermines the vitality of *Zipes v. Trans World Airlines*.

C.H.R.O. has pointed to no prejudice it suffered, nor to any bad faith or lack of due diligence on the part of the Bogle-Assegai, except for the fact that she did not file a separate and simultaneous charge with the C.H.R.O. raising the exact same allegations as the E.E.O.C. complaint. The only fault in this case rests with the governmental agencies, i.e. E.E.O.C. and the C.H.R.O., which may not have taken the steps necessary to ensure that cooperation among a deferral state and the E.E.O.C. occurred so as not to prejudice the rights of a charging party. Equitable tolling is therefore appropriate. To refuse to apply equitable tolling under these circumstances would require discrimination complainants to double-check the relationship between the state deferral agency and the E.E.O.C. and would in effect require the complainant to file with the state agency, when no such requirement statutorily exists. Moreover, it is not clear how discrimination complainants would ever be able to obtain such information regarding the status of any work-sharing agreement. Therefore, the Second Circuit Court of Appeals

decision effectively renders the 300 day period for filing, available to complainants in all other deferral states, unavailable to complainants in Connecticut.

While tolling would not prejudice the C.H.R.O., it would be grossly unfair to Bogle-Assegai and similarly situated complainants. Indeed it would be fundamentally unjust to refuse to equitably toll the charge-filing period where two agencies charged with enforcing Title VII may have acted in a way to deprive discrimination complainants of any means of remedying the agency's alleged deprivation of civil rights.

In *Love* v. *Pullman Co., Id.* this Court announced a guiding principle for construing the provisions of Title VII. This Court declined to read literally a filing provision of Title VII and explained that a technical reading would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co., Id* at 527. Further, in *Zipes* the Court looked to the remedial purposes of Title VII, stating "we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Zipes, Id.* at 398.

D. The Court of Appeals Decision Works To Manifest Injustices, Contrary To This Court's Decision In *Singleton v. Bureau of Medical Services*

Even though the applicability of the 300 day rule was not argued at the District Court level, the Court of Appeals has discretion to consider arguments where, *inter alia*, "injustice might otherwise result." *Singleton v. Bureau of Medical Services*, 428 U.S. 106, 121 (1976), quoting *Hormel v. Helvering*, 312 U.S. 552, 557 n. 8 (1941). The existence of the 300 day rule and the status of C.H.R.O. as a deferral agency with a work-sharing agreement with the E.E.O.C. were so clear that it was deemed to be a non sequitur that the state agency would ever deny the applicability of the work-sharing agreement. To prohibit a complainant from proceeding with a lawsuit when the complainant has timely filed her charge with the E.E.O.C. and received a right to sue letter; because the E.E.O.C. may not have cross-filed with the deferral agency works a manifest injustice.

Circuit Courts have found with regard to the self-executing nature of waivers found in work-sharing agreement that strict compliance with the referral provisions of the work-sharing agreement would be to exalt form over substance and preclude relief to a potentially meritorious claim simply because it was the victim of a bureaucratic mix-up. *E.E.O.C. v. Techalloy Maryland, Inc.*, 894 F.2d 676, 679 (4th Cir. 1990).

"Prohibiting any remedy to claimants who file discrimination complaints with an appropriate state or federal agency within the 300-day deadline is entirely at odds with the purpose of the work-

sharing agreement and with Title VII. These agreements are intended to eliminate duplication of effort between the agencies and to provide an efficient procedure for claimants to seek redress for their grievances". *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1177 (9th Cir. 1999)

It is particularly egregious for the 706 state agency to claim the expiration of the work-sharing agreement when *it is the employer charged with discriminatory employment practices.*

The harm flowing from the Court of Appeals decisions is not limited to Bogle-Assegai alone. The decision has introduced a serious level of instability into the remedial, equitable and regulatory framework of Title VII charge processing for all potential discrimination complainants. The threatened instability is one that discrimination complainants in deferral states cannot overcome because there is no effective way of ascertaining when a work-sharing agreement is in effect. Finally, to allow the addition of such a procedural hurdle for laypersons undermines the decisions of this Court in *E.E.O.C. v. Commercial Office Products.* Leaving the Second Circuit's decision intact sends the wrong message that state deferral agencies that partner with the E.E.O.C. to investigate and remedy discrimination may play fast and loose with procedural rules when they choose to do so.

Denying review would erode public perception of the efficacy of the statutory and regulatory framework as a vehicle for assisting complainants obtain redress of their discrimination claims. The broad remedial purposes of Title VII should not be thwarted particularly by the very fair employment practices agency designated for redress of discrimination.

CONCLUSION

For the foregoing reasons, Femi Bogle-Assegai respectfully requests the Court to grant her petition for certiorari.

Respectfully Submitted,

Josephine S. Miller
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Supreme Court, U.S.
FILED
07-424 MAY 30 2007
OFFICE OF THE CLERK

No. ____

IN THE
Supreme Court of the United States

FEMI BOGLE-ASSEGAI,
Petitioner,
v.
STATE OF CONNECTICUT, COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES CYNTHIA WATTS-ELDER, LEANNE APPLETON, AND DONALD NEWTON
Respondents.

APPENDIX

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September 20, 2007

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:

Docket Number:	05-1858-cv
Short Title:	Bogle-Assegai v. Connecticut
DC Docket Number:	02-cv-2292
DC:	CONNECTICUT (NEW HAVEN)
DC Judge:	Honorable Holly Fitzsimmo N S

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of January two thousand seven.

Femi Bogle-Assegai,

Plaintiff-Appellant,

v.

State of Connecticut, Commission on Human Rights & Opportunities, Cynthia Watts-Elder, I/O as Executive Dir, CHRO, Leanne Appleton, I/O as Dir of Finance of CHRO and Donald Newton, I/O As CHRO Chief of Field Operations,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Femi Bogle Assegai. Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk

By: _____
Motion Staff Attorney

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - -

August Term, 2005

(Argued: April 27, 2006 Decided: November 29, 2006)

Docket No. 05-1858-cv

FEMI BOGLE-ASSEGAI,

Plaintiff-Appellant

- v. -

STATE OF CONNECTICUT, CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES; And CYNTHIA WATTS-ELDER, in her official capacity as Executive Director, Connecticut Commission on Human Rights and Opportunities, ("CHRO") and LEANNE APPLETON, in her individual and official capacity as Director of Finance of CHRO; and DONALD NEWTON, in his individual and official capacity as CHRO Chief of Field Operations,

Defendants-Appellees.

Before: KEARSE, McLAUGHLIN, and SACK, Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, Holly B. Fitzsimmons, Magistrate Judge, dismissing employment discrimination claims, see 42 U.S.C. §§ 1981, 1988; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., on grounds of lack of service of process, Eleventh Amendment immunity, and untimeliness.

Affirmed.

JOSEPHINE SMALLS MILLER, Danbury, Connecticut (Cynthia R. Jennings, The Barrister Law Group, Hartford, Connecticut, on the brief), for Plaintiff-Appellant.

JOSEPH A. JORDANO, Assistant Attorney General, Hartford, Connecticut (Richard Blumenthal, Attorney General of the State of Connecticut, Hartford, Connecticut, on the brief), for Defendants-Appellees.

KEARSE, Circuit Judge:

Plaintiff Femi Bogle-Assegai, a former employee of defendant Connecticut Commission on Human Rights and Opportunities ("CHRO"), appeals from a judgment of the United States District Court for the District of Connecticut, Holly B. Fitzsimmons, Magistrate Judge, dismissing her complaint alleging principally that CHRO and various of its officials discriminated against her and terminated her employment in violation of her rights under 42 U.S.C. § 1981, as enforced through 42 U.S.C. § 1983; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; and state law. The district court granted defendants' motions to dismiss Bogle-Assegai's §§ 1981 and 1983 claims and her state-law claims on the grounds that (a)

defendants State of Connecticut (the "State"), CHRO, and CHRO employees in their official capacities had Eleventh Amendment immunity against such claims, and (b) the individual defendants had not been served with process in their individual capacities. The court granted summary judgment dismissing Bogle-Assegai's Title VII claims on the ground that they were time-barred because she had not asserted them in an administrative complaint within 180 days of the allegedly unlawful employment actions. On appeal, Bogle-Assegai contends principally (1) that her Title VII claims are not time-barred, and (2) that she should have been given an opportunity to remedy the flaws in the service of process. For the reasons that follow, we affirm.

I. BACKGROUND

Except as indicated below, the facts, as asserted in defendants' motion for summary judgment and admitted by Bogle-Assegai in response to that motion, include the following.

A. The Parties and the Course of Bogle-Assegai's Employment

Bogle-Assegai, an African-American of Jamaican descent, was first employed by CHRO in the early 1990s as an investigator, initially in a provisional position and thereafter in a permanent position. In 1995, she was promoted to be regional manager of CHRO's office in Bridgeport; in 1997, she became regional manager of its Waterbury office.

Defendant Cynthia Watts-Elder was executive director of CHRO from March 1999 until August 2003. Defendant Leanne Appleton was CHRO's fiscal administrative supervisor from January 1994 until 2004.

Defendant Donald Newton, a CHRO employee for more than 30 years, began serving as its chief of field operations in 1999. In that capacity, he supervised CHRO's regional managers. He continually reminded all regional managers, including Bogle-Assegai, that

they were expected to be at work every day in accordance with their approved schedules.

Bogle-Assegai, in her two positions as manager of CHRO regional offices, was responsible for supervising the staffs and operations of those offices. Her scheduled working hours were 8 a.m. to 5 p.m. In early 2001, Newton questioned Bogle-Assegai about a time sheet representing that she had worked eight hours on January 26, 2001, a day on which Newton had telephoned her office at 10 a.m. and been informed that she was not in. Bogle-Assegai responded that she had in fact been in the office when Newton called, because she had arrived at work that day at 9:30 a.m. (not by 8 a.m. as her schedule required). Newton sought additional information to shed light on the discrepancy between Bogle-Assegai's insistence that she had been in her office by 9:30 a.m. and the staff member's statement that Bogle-Assegai had not arrived by a.m.

As Bogle-Assegai had an official parking space in a garage with an electronic swipe-card access system, Newton asked Appleton to obtain the access-card records for January 26, 2001, from the garage operator. She did so, and the records for that date showed that Bogle-Assegai had arrived in the garage at 10:30 a.m. Further, other access-card records, whose accuracy Bogle-Assegai does not concede, showed numerous occasions when Bogle-Assegai arrived several hours late for work, occasions when she left work before the scheduled end of the day, and occasions when she both arrived late and left early. For example, for the period November 13, 2000, through February 22, 2001--which encompassed 68 non-holiday weekdays--the access-card records showed that Bogle-Assegai arrived more than one hour late 34 times, including 15 days on which she arrived more than two hours late. After a review of these records, Watts-Elder requested an audit of all CHRO employee time sheets.

Examination of Bogle-Assegai's time sheets revealed numerous hours claimed as work time that were contradicted by the garage access card records of her times of arrival and departure.

On March 1, 2001, Watts-Elder informed Bogle-Assegai in writing that an investigation of her time records had been conducted and that, based on that investigation, CHRO was considering formal discipline, including dismissal. CHRO held a formal hearing on March 12; Bogle-Assegai attended, but she refused to participate or answer questions. She requested and was granted an opportunity to provide a written response; but her response provided no information addressing the discrepancies between her time sheets and the garage access-card data.

On March 29, 2001, Bogle-Assegai received a letter from Watts-Elder, stating that Bogle-Assegai's employment with CHRO would be terminated effective April 12, 2001. (See Letter from Watts Elder to Bogle-

Assegai dated March 29, 2001 ("Termination Letter").) The Termination Letter also informed Bogle-Assegai that "[a]lthough your dismissal will be effective April 12, 2001, and you will be paid through that date, from this day forward, you will neither be expected (nor authorized) to report to work." (Id. at 1.) The letter stated that Bogle-Assegai was being dismissed for the good of CHRO, "as a result of [her] fraudulent use of state time." (Id.)

On October 1, 2001, Bogle-Assegai filed an administrative complaint with the United States Equal Employment Opportunity Commission ("EEOC"). She thereafter received a right-to-sue letter.

B. The Present Action and the Motions To Dismiss

Bogle-Assegai commenced the present action in December 2002 against the State and CHRO, against Watts-Elder in her official capacity, and against Appleton and Newton in their official and individual

capacities, alleging that Bogle-Assegai had been the victim of discrimination on the basis of race, color, and national origin. The complaint alleged that the State and CHRO had subjected her to a hostile work environment and terminated her employment in violation of Title VII. Invoking 42 U.S.C. § 1983, it alleged that defendants had discriminated against Bogle-Assegai on the basis of race, color, and national origin in violation of 42 U.S.C. § 1981 and her right to equal protection. The complaint also alleged that defendants' conduct violated the Connecticut Fair Employment Practices Act ("CFEPA"), Conn. Gen. Stat. §§ 46a-70, 46a-71. The parties consented to have the case assigned to a magistrate judge for all purposes.

Following discovery, defendants moved to dismiss Bogle-Assegai's claims on various grounds. Appleton and Newton, who in their amended answer to the complaint had alleged insufficiency of service of

Process, sought dismissal pursuant to Fed. R. Civ. P. 12(b)(5) of the claims asserted against them in their individual capacities, arguing that they had not been served personally. They submitted affidavits stating that they had been served only through the office of the State Attorney General and that they had not authorized that office to accept service on their behalf. In addition, all defendants moved pursuant to Fed. R. Civ. P. 56 for summary judgment dismissing Bogle-Assegai's §§ 1981 and 1983 claims against the State, CHRO, and the individual defendants in their official capacities on the ground that those claims were barred by the Eleventh Amendment. Defendants contended that the Eleventh Amendment also barred Bogle-Assegai's pursuit of her state law claims in federal court, as "the Connecticut legislature only authorized suit in the Connecticut Superior Court" on such claims, "not in the federal court." (Defendants' Memorandum in Support of Their Motion for Summary Judgment ("Defendants'

Summary Judgment Memorandum") at 39 (emphasis in original).)

Defendants sought summary judgment dismissing Bogle-Assegai's Title VII claims on the ground that they were time-barred because she had not filed her administrative charge with the EEOC within the 180-day period specified by 42 U.S.C. § 2000e-5 (e)(1) for filings with the EEOC. Defendants noted that the period for Bogle-Assegai to file an administrative claim of discriminatory discharge began on the date on which she received notification that her employment would thereafter be terminated (see Defendants' Summary Judgment Memorandum at 23 (citing Delaware State College v. Ricks, 449 U.S. 250 (1980)); that Bogle-Assegai had received formal notice of termination on March 29, 2001; and that she had filed her charge with the EEOC on October 1, 2001, more than 180 days later. Defendants observed that § 2000e-5(e)(1) provides that the filing period is 300 days rather than

180 days where a claimant has filed her claims with a state or local agency, but they pointed out that Bogle-Assegai

> Did not institute proceedings with a state or local agency (i.e. CHRO) with authority to grant relief in compliance with 42 [U.]S.C. § 2000e-5 (e), nor did the EEOC defer the Complainant's charge to the state agency... in Connecticut for an investigation. Therefore, the appropriate limitations period is 180 days from March 29, 2001. . . .
>
> Since there was no dual filing with both CHRO and EEOC (it was filed only with EEOC), the plaintiff is not entitled to 300 days and her Title VII claim is untimely and must be dismissed for this reason [among others]. National RR Passenger Corp. v. Morgan, 536 U.S. 101 . . . (2002).

(Defendants' Summary Judgment Memorandum at 24 (emphases in original).)

Defendants also argued that Bogle-Assegai could not present a prima facie case of prohibited discrimination, asserting, inter alia, that her fraudulent reporting of time worked had been the sole reason for her dismissal. (See id. at 25-31; see also Defendants' Rule 56(a)1 Statement of Facts ¶ 97 ("Plaintiff was terminated for falsifying her time records and the theft of state time."); Plaintiff's Rule 56 (B) 1 Statement of Facts ¶ 97 ("Admit.").)

Bogle-Assegai opposed defendants' motions to dismiss, arguing principally that she could present a prima facie case of discrimination. As to the motions of Appleton and Newton to dismiss the

individual-capacity claims asserted against them, however, Bogle-Assegai admitted that those defendants had not been personally served and that they had not authorized anyone to accept personal service on their behalf (see Defendants' Rule 56(a)1 Statement of Facts ¶¶ 5, 7; Plaintiff's Rule 56 (B)1 Statement of Facts ¶¶ 5, 7), and she did not offer any argument as to why the individual-capacity claims against them should not be dismissed for lack of service of process. Nor did Bogle-Assegai offer any argument as to why the State, CHRO, and the individual defendants in their official capacities did not have Eleventh Amendment immunity with respect to her §§ 1981 and 1983 claims or her state-law claims as asserted in this action.

With respect to defendants' contention that her Title VII claims were time-barred, Bogle-Assegai argued as follows:

> The defendants argue that the statute began to run on March 29, 2001, when Mrs. Bogle-Assegai was informed that she would be terminated. Mrs. Bogle- Assegai suggests that the court should not use the date that the defendant indicates she "would" be terminated; but rather the date that she was in fact terminated. Mrs. Bogle-Assegai was effectively terminated April 12, 2001. Further, the question whether a court may, for purposes of determining liability, review all such conduct, including those acts that occur outside the filing period, turns on the statutory requirement that a charge be filed within a certain number of days "after the alleged unlawful employment practice occurred." Because such a claim is composed of a series of separate acts that collectively constitute one "unlawful employment practice," it does not

> matter that some of the component acts fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered for the purposes of determining liability. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101 (2002).

(Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Bogle-Assegai Memorandum Opposing Summary Judgment") at 5-6.)

C. The Decision of the District Court

In a Ruling on Motion for Summary Judgment, dated March 10, 2005 ("District Court Opinion"), the district court granted defendants' motions and dismissed the complaint. The court first granted the motion to dismiss the claims asserted against Appleton and Newton in their individual capacities, noting that it was undisputed that process had been served on them only by service on the Office of the Attorney General. See District Court Opinion at 5, 7. The court held that, as those defendants had not authorized anyone to accept

service of process for them in their individual capacities, service on a State office was insufficient to constitute personal service on them for claims against them in their individual capacities.

The district court next concluded that the Eleventh Amendment barred Bogle-Assegai's claims under §§ 1981 and 1983 against the State, CHRO, and the individual defendants in their official capacities, holding that the State had not waived its sovereign immunity and that "Congress's enactment of § 1981 and § 1983 did not override the immunity that the states and their agencies enjoy under the Eleventh Amendment." Id. at 9. The court ruled that the Eleventh Amendment also required the dismissal of Bogle-Assegai's state-law claims. The court noted that the State had "waived its immunity to suit in state court for CFE[P]A claims. But it has not clearly expressed a waiver to suit in

federal court." Id. (internal quotation marks omitted).

Finally, the district court concluded that Bogle-Assegai's Title VII claims were untimely. The court stated that Title VII requires a plaintiff to file an administrative complaint with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred," 42 U.S.C. § 2000e-5 (e); and that a claim of discriminatory termination of employment "accrues on the date the termination decision is made and communicated to the employee," District Court Opinion at 10-11 (citing Delaware State College v. Ricks, 44 9 44 9 U.S. at 2 58). The court found that

> [i]n this case, plaintiff received her formal notice of termination on March 29, 2001. . . . The termination notice stated that she was no longer authorized to report to work after March 29, 2001. . . Her administrative charge was filed on October 1, 2001, 186 days following her formal notice of termination. . . . Plaintiff's contention that the limitations period begins to run as of the effective

> date of her termination, April 12, 2001, is unsupported by the case law.

District Court Opinion at 11.

The district court noted that "[under certain circumstances, the [180-day] filing period is extended to three hundred (300) days," i.e., where "the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from" the alleged "unlawful employment practice," id. at 10 n.7, but that "[here, plaintiff only filed a claim with the EEOC; thus the 180 day limitations period applies," id. The court found that there was no evidence of a "continuing violation" that could extend the 180-day filing period.

Judgment was entered dismissing the complaint, and this appeal followed.

II. DISCUSSION

On appeal, Bogle-Assegai contends principally that the district court erred in dismissing

her Title VII claims as time- barred, arguing that they were subject to the 300-day, rather than the 180-day, filing period. She also contends, inter alia, that the court should not have dismissed her claims against Appleton and Newton in their individual capacities but, at worst, should have given her an extension of time to effect personal service on them. We are unpersuaded.

A. The Filing Period Applicable to the Title VII Claims

Bogle-Assegai contends that the district court erred in dismissing her Title VII claims as untimely, arguing principally that the applicable period for the filing of her administrative charge, which she filed 186 days after she received the Termination Letter, was not 180 days but 300 days. She argues that the State has a work-sharing agreement with the EEOC, and that under such agreements the filing of an administrative charge with either the EEOC or the State agency (here CHRO) is deemed a filing with each agency--a dual filing--and is timely if made within 300 days. We reject this contention because it was not raised in the district court and because Bogle-Assegai has failed to present any reasonable ground for its consideration by this Court.

[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994). "However, because th[is] rule

is prudential, not jurisdictional, we have discretion to consider waived arguments," Sniado v. Bank Austria AG, 378 F.3d 210, 213 (2d Cir.), vacated on other grounds, 542 U.S. 917 (2004), and "[w]e have exercised this discretion where necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact finding," Allianz Insurance Co. v. Lerner, 416 F.3d 109, 114 (2d Cir. 2005) (internal quotation marks omitted). Nonetheless, the circumstances normally "do not militate in favor of an exercise of discretion to address . . . new arguments on appeal" where those arguments were "available to the [parties] below" and they "proffer no reason for their failure to raise the arguments below." Id.

It is clear that Bogle-Assegai did not make her present argument to the district court, although she had ample incentive to do so. Defendants' motion for summary judgment asserted that "there was no dual

filing with both CHRO and EEOC (it was filed only with EEOC)," and thus that "plaintiff is not entitled to 300 days and her Title VII claim is untimely and must be dismissed . . . ." (Defendants' Summary Judgment Memorandum at 24 (emphases in original)). As described in Part I.B. above, Bogle-Assegai's response to this untimeliness contention made no reference to a work-sharing agreement, or to the concept of dual filing, or to any possibility that the applicable period was 300 days. Her memorandum argued only that defendants had used the wrong starting date for calculating the 180-day period and that the 180-day deadline had been met. (See Bogle-Assegai Memorandum Opposing Summary Judgment at 5 ("the court should not use the [March 29] date that the defendant indicates she 'would' be terminated; but rather the date that she was in fact .... effectively terminated [,] April 12").)

At oral argument of this appeal, we asked counsel to review the record and inform this Court whether Bogle-Assegai had in fact argued in the district court that the 300-day filing period applied to her claims. In response, Bogle-Assegai's counsel submitted a letter stating that "counsel for Plaintiff-Appellant has made a diligent search of the record below and finds that with regard to the 300-day filing rule, Plaintiff-Appellant did not specifically argue the 300-day rule." (Letter from Bogle-Assegai's attorney Josephine Smalls Miller to this Court dated April 28, 2006 ("Miller Letter").

Bogle-Assegai's counsel argued, however, that the complaint's citation of 42 U.S.C. § 2000e-5, which "provides for the 180-day filing period and the 300-day filing period in deferral states .... was sufficient to raise the issue for all subsequent purposes." (Miller Letter.) We disagree. The mere citation to a statute that provides alternative filing periods, the applicability of

each turning on whether the EEOC has or does not have a work sharing agreement with the state agency, does not constitute an assertion that there in fact existed such an agreement at the pertinent time and that the longer period applies. We see nothing in the record to indicate that Bogle-Assegai raised the issue of the existence of a work-sharing agreement before the district court or that she in any way suggested to that court that the filing period applicable to her was 300 days.

Bogle-Assegai urges us nonetheless to entertain her present 300-day contention, arguing that we should take judicial notice that the EEOC regularly enters into such work-sharing agreements, that the existence of such an agreement presents an issue that is purely legal, and that CHRO should not be allowed to deny the existence of a work-sharing agreement on which she relied. These arguments are meritless.

Bogle-Assegai's contention that "[t]his court may take judicial notice of the fact that the [EEOC]

regularly enters into work-sharing agreements with state fair employment practices [sic]" (Bogle-Assegai reply brief on appeal at 2 (emphasis added)) is not a sound basis for consideration of her new argument. Even if we were to take judicial notice of that practice in general, it would not ineluctably follow that there existed such an agreement between the EEOC and CHRO on October 1, 2001, in particular.

Further, despite Bogle-Assegai's assertion that "the issue is purely legal and there is no need for additional fact-finding" (id. at 1 (internal quotation marks omitted)), the question of whether there existed a work-sharing agreement between the EEOC and CHRO on October 1, 2001, is a question of fact, not a question of law. Defendants state that no such agreement was in effect on that date (see Defendants' brief on appeal at 9 n.2); and if Bogle-Assegai had proffered any evidence that such an agreement did in fact exist on that date, there plainly would be a need for factfinding.

Moreover, Bogle-Assegai has not given this Court any indication that she would be able to offer evidence that in fact such an agreement existed at the time she filed her administrative charge. Her brief repeatedly refers to and purports to quote "the work-sharing agreement" (emphasis added) between the EEOC and CHRO, as if the existence of such an agreement at the pertinent time were established (see, e.g., Bogle-Assegai brief on appeal at 15 ("In the instant case, the relevant portions of the work-sharing agreement between the EEOC and CHRO state [] . . ."); see also id. at 17 n.2,19, 29; Bogle-Assegai reply brief on appeal at 1, 3, 5). But not one of these quotes or references is accompanied by a citation to an agreement or to any evidence.

Bogle-Assegai calls our attention to the decision in Lewis v. Connecticut Department of Corrections, 355 F.Supp.2d 607 (D. Conn. 2005) ("Lewis"), as an indication that there existed a work sharing agreement

between the EEOC and CHRO. That case does not, however, show that such an agreement existed at the time pertinent to Bogle-Assegai. The Lewis court noted that the work-sharing agreement that had been submitted to that court by that plaintiff stated:

> Charges that are received by the [CHRO], whether in person or by mail, and jurisdictional with the EEOC and timely filed by the charging party or his/her representative will be automatically dual-filed with the EEOC and vice versa. . . .
>
> FY 2001 EEOC/FEPA Worksharing Agreement Between Connecticut Commission on Human Rights and Opportunities and Equal Employment Opportunity Commission, Pl's Index of Evidence in Supp. of Objection to Summ. J. . . .

355 F.Supp.2d at 615 n.4 (emphasis omitted). As cited, however, the document quoted by the Lewis district court was a "FY 2001" work- sharing agreement, and regardless of whether "FY 2001" referred to the fiscal year of Connecticut or to that of the federal government, it did not encompass October 1, 2001, the date on which Bogle-Assegai's administrative charge was filed. Fiscal years of Connecticut end on June 30 of each calendar year, see Conn. Gen. Stat. § 4-35 (2006);

fiscal years of the United States end on September 30 of each calendar year, see Bill Heniff Jr., Cong. Research Serv., The Federal Fiscal Year 1 (2003), available at http://www.rules.house.gov/archives/crs_reports.htm; and "[e]ach fiscal year is identified by the calendar year in which it ends and commonly is referred to as 'FY.' For example, [federal] FY2003 began October 1, 2002, and ends September 30, 2003," id. (emphasis added) ; see also Memorandum from the Comptroller of the State of Connecticut on Fiscal Year 2006 Year-End Instructions (2006), available at http://www.osc.state.ct.us/2006memos/fiscalyearend/fyeinstructions.htm (describing monies deposited prior to July 1, 2006 as "Fiscal Year 2006" receipts) . Thus, the Connecticut FY 2001 ran from July 1, 2000, through June 30, 2001; the United States FY 2001 ran from October 1, 2000, through September 30, 2001; and whichever government's "FY 2001" was referred to in the title of the work-sharing agreement quoted in

Lewis, that FY ended before the filing of Bogle-Assegai's administrative charge with the EEOC on October 1, 2001.

Finally, Bogle-Assegai's argument that "CHRO should not be permitted to work an injustice upon claimants, such as Plaintiff- Appellant, who relied upon the existent [sic] of the charge processing agreement" (Bogle-Assegai reply brief on appeal at 4-5 (emphasis added)) fails for lack of any evidence whatever to support its factual premise. Bogle-Assegai, in filing her administrative charge 186 days after her receipt of the Termination Letter, cannot be found to have relied on the existence of a work-sharing agreement. Had she so relied, she would have argued the existence of such an agreement in the district court. Instead, she argued that the 180 days began to run on the effective date of termination rather than on the earlier date of notice of termination. And even after the district court granted summary judgment dismissing the Title VII claims,

stating that "the 180 day limitations period applies," District Court Opinion at 10 n.7, Bogle-Assegai did not move for reargument on the ground that the applicable period was 300 days or that there was a work-sharing agreement. Bogle-Assegai did move in November 2005 to reopen the judgment pursuant to Fed. R. Civ. P. 60(b), but she did so on entirely different grounds.

In sum, faced with a summary judgment motion expressly asserting that her charge had not been dually filed with the state agency and that the 300-day filing period therefore did not apply to her claims, Bogle-Assegai had every incentive and opportunity to contest that argument. She made no argument to the district court in opposition. And in arguing to this Court that the 300-day period is applicable, she has proffered no reason for her failure to make that argument in the district court and has pointed to no evidence that would support her factual premises. In the circumstances, appellate consideration of her unpreserved argument is

unwarranted. We affirm the district court's dismissal of Bogle-Assegai's Title VII claims on the ground that her administrative charge was not timely filed.

B. The Dismissals for Improper Service of Process

Bogle-Assegai contends that the district court erred in dismissing her claims against Appleton and Newton in their individual capacities for improper service of process, arguing that those defendants had actual notice of her claims and did not show that the improper service caused them prejudice. She also contends that the district court should have given her additional time pursuant to Fed. R. Civ. P. 4 (m) to affect service on them personally. Her contentions lack merit.

Rule 4(e) of the Federal Rules of Civil Procedure states in pertinent part that

> [u]nless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed . . . may be affected in any judicial district of the United States:

> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
>
> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e). In the present case, Bogle-Assegai conceded that Appleton and Newton had not been served personally and that they had not authorized anyone to accept personal service on their behalf. Hence Bogle-Assegai did not meet the requirements of Rule 4(e)(2) and would have been able to show that service was proper only if Connecticut law permitted service on a defendant in his or her individual capacity by serving the Attorney General.

Connecticut law, however, provides that delivery to the Attorney General constitutes service on

an individual state officer or employee "as" an officer or employee:

> Service of civil process in any civil action or proceeding maintainable against . . . the state or ... any officer, servant, agent or employee of the state or of any such institution, board, commission, department or administrative tribunal, as such, may be made by leaving a true and attested copy of the process, including the declaration or complaint, with the Attorney General or at his office in Hartford.

Conn. Gen. Stat. § 52-64 (2005) (emphases added). This provision on its face does not authorize service through the Attorney General's office on an individual State employee in his or her individual capacity.

With respect to an individual who is an officer or employee of the State but is not sued as such, Connecticut law requires that service be made by "leaving [the summons and complaint] with the defendant[] or at his usual place of abode." Conn. Gen. Stat. § 52-57(a) (emphasis added). See, e.g., Banerjee v. Roberts, 641 F. Supp. 1093, 1099 (D. Conn. 1986)

(service "through the Connecticut Attorney General" sufficed to serve the "defendants in their official capacities" but was "not" a "method[] authorized" for "serv[ing them] with process in their individual capacities"); cf. Armstrong v. Sears, 33 F.3d 182, 186-87 (2d Cir. 1994) ("in a Bivens case, personal service should be made upon the individual defendant in accordance with Rule 4(e) instead of upon that individual as a government officer in accordance with Rule 4 (i) (2)" (emphasis in original)) . Accordingly, service on Appleton and Newton was not properly affected on them in their individual capacities.

Bogle-Assegai contends, however, that the district court should simply have given her additional time pursuant to Rule 4 (m) to affect service on Appleton and Newton personally. That Rule provides, in pertinent part, as follows:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff,

> shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4 (m) (emphases added); see, e.g., Romandette v. Weetabix Co., 807 F.2d 309, 311 (2d Cir. 1986) ("By the explicit terms of Rule 4(j) [predecessor to the present Rule 4(m), see Fed. R. Civ. P. 4 Advisory Committee Note (1993)], the court can disregard a failure to meet the 120-day limit if the plaintiff can show 'good cause why such service was not made.'").

Rule 4 (m) provides little relief for Bogle-Assegai. Appleton and Newton raised the matter of improper service in their amended answer to the complaint in July 2003, and they requested dismissal on that ground in September 2004. In response to the motion to dismiss, Bogle-Assegai conceded that those defendants had not been properly served in their individual capacities; but she offered no excuse whatever for the defective service. Further, despite

having been informed that Appleton and Newton objected to the improper service at least as early as July 2003, and despite the continued pendency of the lawsuit until March 2005, Bogle-Assegai never attempted to remedy the defect by asking the district court to extend her time to effect personal service. It is plain therefore that Bogle-Assegai did not make the showing of good cause that could have allowed the district court, in accordance with Rule 4(m), to extend her time to effect proper service.

Although Bogle-Assegai (a) relies on Romandette v. Weetabix Co. for the proposition that defective service must be excused where the defendant has received actual notice and has shown no prejudice, and (b) suggests that she was not required to show good cause in order to be given an extension of time to make proper service, her reliance is misplaced and her suggestion is unsupported by any authority of this Court. In Romandette, in which process had been

mailed to the defendant rather than served personally, Romandette was an incarcerated pro se litigant who was "entitled to rely on service by the U.S. Marshals," 807 F.2d at 311. He had "timely requested that the Marshals effect personal service," and the Marshals Service "had indicated that it would personally serve" the defendant. Id. at 310. Clearly, "Romandette had done everything in his power to effect personal service through the Marshal[]s Service," and we concluded that he "plainly exhibited good cause," id. at 311. Bogle-Assegai has not called to our attention any case in which this Court has ruled that the good-cause requirement specified in Rule 4 (m) may be disregarded, and we are aware of no such case.

> In any event, Bogle-Assegai, who was neither a pro se litigant nor incarcerated, made no showing whatever as to any effort on her part to effect personal service on Appleton and Newton. And given that she also made no effort to show good cause for her failure and never requested an extension of time during the 600-odd days when the case was pending after she first learned of the Appleton/Newton objections to service, we hardly think an extension of the 120-day period, in lieu of

dismissal, could have been an extension for "an appropriate period." Accordingly, we see no error or abuse of discretion in the district court's decision to dismiss.

C. Other Contentions

Bogle-Assegai makes other arguments in her brief on appeal that do not require extended discussion. She contends, inter alia, that the district court erred in dismissing her §§ 1981 and 1983 claims, arguing that they were "timely filed" (Bogle-Assegai brief on appeal at 24) as they do not require pre-suit administrative proceedings and are governed by a three-year statute of limitations (see id. at 24-25) . The district court did not, however, dismiss those claims on the ground that they were time-barred. The §§ 1981 and 1983 claims were dismissed on the ground that as to those claims the State, CHRO, and the individual defendants in their official capacities were entitled to Eleventh Amendment immunity. Bogle-Assegai has presented no argument disputing that immunity, either in the district court or on this appeal.

Bogle-Assegai also argues that the State, CHRO, and the individual defendants in their official capacities are not entitled to Eleventh Amendment immunity with respect to her claims under Title VII. However, the district court did not dismiss Bogle-Assegai's Title VII claims on the ground of Eleventh Amendment immunity but rather, as discussed in Parts I.e. and II.A. above, on the ground that Bogle-Assegai's filing of her administrative complaint with the EEOC was untimely.

Bogle-Assegai's arguments going to the merits of her claims of discriminatory and disparate treatment are moot in light of the dismissals on the grounds of improper service, sovereign immunity, and untimeliness.

Finally, we note that Bogle-Assegai's briefs on appeal do not challenge the dismissal of her state-law claims in any respect. Thus, the dismissal of those claims stands as well.

CONCLUSION

We have considered all of Bogle-Assegai's arguments on this appeal to the extent that they are properly before us, and we have found them to be without merit. The judgment of the district court is affirmed.

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT .OF CONNECTICUT

FEMI BOGLE-ASSEGAI	:	
v.	:	CIV.NO.3.02CV2292(HBF)
STATE OF CONNECTICUT, COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, CYNTHIA WATTS-ELDER, LEANNE APPLETON, and DONALD NEWTON	:	

RULING ON MOTION FOR SUMMARY JUDGMENT

Plaintiff, Femi Bogle-Assegai, brings this five count complaint for unlawful termination Of her employment under 42 U.S.C. §2000e et seq. (Title VII), 42 U.S.C. §§1981, 1983 (civil rights) and Sections §§46a-58(a), 46a-60 (a) (1) , (4), (5), 46a-70 and 4 6a-71 of the Connecticut Fair Employment Practices Act ("CFEPA").[1] She alleges that her former employer and co-workers discriminated

[1] Defendants are the State of Connecticut Commission on Human Rights and Opportunities ("CHRO"); Cynthia Watts-Elder, the former CHRO Executive Director, sued in her official capacity; Leanne Appleton, CHRO Director of Finance, sued in her individual and official capacities; and Donald Newton, CHRO Chief of Filed Operations, sued in his individual and official capacities.

against her in her employment on the basis of race, color, national origin and religion.[2]

Pending is all defendants' Motion for Summary Judgment [Doc. #45]. For the reasons that follow, defendants' motion is GRANTED.

STANDARD OF LAW

Summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. See D'Amico v: City of New York, 132 F.3d 145, 149 (2d Cir. 1998); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, (1986). The non-moving party may not rely on conclusory allegations or unsubstantiated speculation. See D'Amico, 132 F.3d at 149. Instead, the non-moving party must produce specific, particularized facts indicating that a genuine factual issue

[2] In Count One, plaintiff alleges discriminatory employment practices against the CHRO pursuant to Title VII, 42 U.S.C. §2000e (2) and (3), Conn. Gen. Stat. §§46a 58(a), 46a-60(a) (1), (4), (5). In Count Two, plaintiff alleges discriminatory or disparate treatment by Watts-Elder, Appleton and Newton in violation of 42 U.S.C. §1981, 1983, and Article First, §20 of the Connecticut Constitution. In Count Three, plaintiff alleges a hostile work environment against the CHRO. Count Four contains

exists. See Wright v. Coughlin, 132 F.3d 133, 137 (2d Cir. 1998). To defeat summary judgment, "there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson, 477 U.S. at 252. If the evidence produced by the non-moving party is merely colorable or is not significantly probative, summary judgment may be granted. See id. at 249-50.

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an allegation of discriminatory employment practices against Watts-Elder, Appleton and Newton in violation of 42 U.S.C. §1981, the equal protection clause of the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. §1983,- and Article First, §8 of the Connecticut Constitution. Finally, in Count Five, plaintiff alleges a violation of Conn. Gen. Stat. §46a-70 ("guarantee of equal employment in state agencies"), Conn. Gen. Stat. §4 6A-71 ("discriminatory practices by state agencies prohibited") and seek relief pursuant to Conn. Gen. Stat. §46a-99.

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Pursuant to D. Conn. L. Civ. R. 56(a) (3),

Each statement of-material fact in a Local Rule 56 (a)1 Statement by a movant or by an opponent in a Local Rule 56(a)2 Statement, and each denial in an opponent's Local Rule 56(a)2 Statement, must be followed by a specific citation to (1) the affidavit of a witness competent to testify as to the facts at trial and/or (2) evidence that would be admissible at trial. The affidavits, deposition testimony, responses to discovery requests, or other documents containing such evidence shall be filed and served with the Local Rule 56 (a)1 and 2 Statements in conformity with Fed. R. Civ. P. 56(e). Counsel and pro se parties 'are hereby notified that failure to provide specific citations to evidence in the record as required by this Local Rule may result in sanctions, including, when the movant fails to comply, an order denying the motion for summary judgment, and, when the opponent fails to comply, an order granting the motion.

> When a motion for summary judgment is supported by documentary evidence and sworn affidavits, the nonmoving party must present "significant probative evidence to create a genuine issue of material fact." Soto v. Meachum, Civ. No. B-90-270 (WWE), 1991 WL 218481, at *6 (D. Conn. Aug. 28,-1991). A party may not rely "on mere speculation or' conjecture as to the true nature of the facts to overcome a motion for summary judgment." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987)

A party may not create a genuine issue of material fact by presenting contradictory or unsupported statements. See Securities & Exchange Comm'n v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir.'1978). Nor may he rest on the "mere allegations or denials" contained in his pleadings. Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995). See also Ying Jing Gan v. City of

New York, 996 F.2d 522, 532 (2d Cir. 1993) (holding that party may not rely on conclusory statements or an argument that the affidavits in support of the motion for summary judgment are not credible). A self-serving affidavit which reiterates the conclusory allegations of the I complaint in affidavit form is insufficient, to preclude summary judgment. See Lujan v. National Wildlife Fed'n., 4 97 U.S. 871, 888 (1990). .

FACTS

Based on defendants' Local 56(a)(1) Statement and exhibits and plaintiffs Local 56 (a) 2 Statement and exhibits, the following facts are undisputed.[3]

The Parties

1. Plaintiff Femi Bogle-Assegai is a resident of the State of Connecticut. [Pi. Local Rule 56(a)(1) Stat. Doc. #45-2, 51; Def. Local Rule 56(a)(2) Stat. Doc. #54, ¶]. She is an African American black woman

[3] The Court finds only those facts necessary to rule on the issues decided in this ruling.

of West Indian (Jamaican) descent. She is over forty (40) years old. [Compl. ¶11].

2. Plaintiff was hired by CHRO Executive Director Louis Martin on January 3, 1992. [Doc. #45-2, ¶2; Doc. #54, ¶2]. At the time of the termination of her employment, plaintiff was Regional Manager of the CHRO office in Waterbury, Connecticut. [Doc. #45-2, ¶11; Doc. #54, Sill].'

3. Defendant Cynthia Watts-Elder served as the Executive Director of the CHRO from March 1999 through August 2003. [Doc. #45-2, ¶3; Doc. #54, ¶3] .

4. Defendant Leanne Appleton served as the Fiscal Administrative Supervisor (Business Manager) for the CHRO from January 27, 1994, through 2004. [Doc. #45-2, ¶4; Doc. #54, ¶4].

5. Defendant Donald Newton has been employed by the CHRO for over thirty (30) years and, since fall

1999, has been serving as the Chief of Field Operations. [Doc. #45-2, ¶6; Doc'. #54, ¶6] .

Service of Process: Appleton and Newton

6. Service of process was effectuated against defendants CHRO, Watts-Elder, Appleton and Newton in their official capacity at the Office of the Attorney General on December 27, 2002. [Doc. #5].

7. Defendant Leanne Appleton was not personally served with process in this case and at no time did she authorize anyone to accept personal service of process on her behalf. [Doc. #45-2, ¶5; Doc. #54, ¶5] .

8. Defendant Donald Newton was never personally served with process in this case and at no time did he authorize anyone to accept personal service of process on his behalf. [Doc. #45-2, ¶7; Doc. #54, ¶7].

Filing of Administrative Charge

9. On March 29, 2001, Cynthia Watts-Elder informed plaintiff that her employment was terminated, effective April 12, 2001. [Doc. #45-2, ¶7, 93;. Doc. #54, ¶93]. The letter was hand delivered to plaintiff. [Def. Ex. 70].

10. The termination letter states in part, "Although your dismissal will be effective April 12, 2001, and you will [be] paid through that date, from this day forward, you will neither be expected (nor authorized) to report to work." [Def. Ex. 70].

11. Plaintiff filed her charge of discrimination directly with the EEOC on October 1, 2001, 186 days after receiving her employment termination notice on March 29, 2001. [Doc. #45-2, ¶121, Def. Ex. 70, 84].

12. On September 17, 2002, a "no cause" finding was issued by the EEOC. [Def. Ex. 84].

13. Plaintiff filed this federal action on December 24, 2002. [Doc. #1].

DISCUSSION

1. Service of Process: Appleton and Newton

Defendants Appleton and Newton contest personal jurisdiction under Rule 12(b) (5), based on lack of proper service of process.[4]

> A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(5), must be granted if the plaintiff fails to serve a copy of the summons and complaint on the defendants pursuant to Rule 4 of the Federal Rules of Civil Procedure. Cole v. Aetna Life & Cas., 70 F. Supp. 2d 106, 109 (D. Conn. 1999). "Once validity of service has been challenged, it becomes the plaintiff's burden to prove that service of process was adequate." Id. at 110 (citations omitted).

It is undisputed that Appleton and Newton were not served in their individual capacities with the summons and complaint. See Fed. R. Civ. P. 4(e) and (f);. Conn. Gen. Stat. §52-57 (a). Both Appleton and Newton executed affidavits stating that they were not served personally and

[4] In the Amended Answer, defendants raised the issue of lack of personal jurisdiction pursuant to Rule 12(b) (4) and 12(b) (5). [Doc. #18 at 10].

no one was authorized to accept service of process for them in their individual capacities. [Doc. #45-2, ¶¶5, 7; Stat. Doc. #54, ¶¶5, 7]. Service through the CHRO in their official capacity is not sufficient is constitute personal service. Burgos v. Dep't of Children and Families, 83 F. Supp. 2d 313, 316 (D. Conn. 2000). Plaintiff concedes that defendants Appleton and Newton were only served in their official capacity.

Accordingly, he motion to dismiss is granted in favor of defendants Appleton and Newton in their individual capacities.

2. Eleventh Amendment

Defendants argue that the Eleventh Amendment bars suit against the CHRO and defendants Watts-Elder, Appleton and Newton in their official capacities.

suit in federal court by all private parties for all causes of action. Bd. of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356, 363 (2001) Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984). This immunity applies to state agencies and departments, as well state officials who act on its behalf. Burnette v. Carothers, 192 F.3d 52, 57 (2d Cir. 1999), cert. denied, 531 U.S. 1052 (2000); Gaynor v. Martin, 77 F. Supp. 2d 272, 281 (D. Conn. 1999). The CHRO is a state agency and is, therefore, covered by the Eleventh Amendment.

A state may be subject to suit in federal court one of two ways: (1) Congress can divest a state of immunity through a statutory enactment, as it has done with Title VII; or (2) a state may waive its immunity and agree to be sued in federal court. Close v. New York, 125 F.3d 31, 39 (2d Cir. 1997). However, a state may consent to suit in its own courts without consenting to suit in federal court. Smith v. Reeves, 178 U.S. 436, 441-45 (1900); Pennhurst, 465 U.S.

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equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

at 99; see also Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944) ("A clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.").

Connecticut has not waived its immunity and consented to suit in federal court under § 1981 or §1983, and Congress's enactment of §1981 and §1983 did not override the immunity that the states and their agencies enjoy under the Eleventh Amendment, see, e.g., Will v. Michigan Dep't of State Police, 491 U.S. 58, 66 (1989); Quern v. Jordan, 440 U.S. 332, 343 (1979).

Plaintiff's state-law CFEA claims are similarly barred. Under Connecticut law, Conn. Gen. Stat. §§46a-99, 46a-100,[6] "Connecticut waived its immunity to suit in state court for CFEA claims. But it has not clearly expressed a waiver to suit in federal court. Therefore, the courts in this district have consistently found that CFEPA claims against the state and its agents are barred by the Eleventh Amendment." Alunghe v. Board of Trustees of the

[6] Conn. Gen. Stat. §46a-99 states:

Connecticut State University (CSU) System, 2 83 F. Supp. 2d 674, 687-88 (D. Conn. 2003) (citing Lyon v. Jones, 168 F. Supp. 2d 1, 6, (D. Conn. 2001)).

Any person claiming to be aggrieved by a violation of any provision of sections 46a-70 to 46a-78 . . . may petition the superior court for appropriate relief and said court shall have the power to grant such relief, by injunction or otherwise, as it deems just and suitable. Conn. Gen. Stat. §46a-100

Any. person who has timely filed a complaint with the Commission on Human Rights and Opportunities in accordance with section 46a-82 and who has obtained a release from the commission . . . [for] any action involving a state agency or official may be brought in the superior court for the judicial district of Hartford."

Moreover, courts in this district have held that Section. 46a-58 does not provide for a private cause of action under the statute. Garcia v. Saint Mary's Hosp., 46 F. Supp. 2d 140, 142 (D. Conn. 1999) ("Section 4 6a-58

claims must be brought through the CHRO's administrative procedures.") (citation omitted); Alungbe, 283 F. Supp. 2d at 687.; Lyon, 168 F. Supp. 2d at 6, n.2.

Accordingly, summary judgment on Counts Two, Four and Five is granted in favor of the CHRO and defendants Watts-Elder, Appleton and Newton in their official capacities.

3. Plaintiffs Title VII Claims Are Untimely

"Title VII requires aggrieved persons to file a complaint with the EEOC within one hundred and eighty days after the alleged unlawful employment practice occurred.'" Delaware State College v. Ricks, 449 U.S. 250, 258 (1980) (citing 42 U.S.C. §2000e-5 (e).[7] This limitations period is to be strictly construed. Lenox v. Unisys Corp. 32 F. Supp. 2d 44, 45 (D. Conn. 1999) (citing Economu v. Borg-Warner, Corp., 829 F.2d 311, 315 (2d Cir. 1987)

[7] Under certain circumstances, the filing period is extended to three hundred (300) days. 42 U.S.C. §2000e-5(e)(1) ("[E]xcept that in a case of unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice. . . ."). Here, plaintiff only filed a claim with the EEOC; thus the 180 days' limitations period applies.

(complaint dismissed, pursuant to Fed. R. Civ. P. 12(b)(6), where ADEA claim had been filed 301 days after plaintiff received termination notice)).

A claim of employment discrimination accrues on the date the termination decision is made and communicated to the employee. Ricks, 449 U.S. at 258. "The proper focus is on the time of the discriminatory act, not on the point at which the consequences of the act become painful." Chardon v Fernandez, 454 U.S. 6, 8 (1981) (citing Ricks, 449 U.S. at 258). It follows that "the last date of employment may not always coincide with the start of the 'statutory limitation clock." Lenox, 32 F. Supp. 2d at 45 (dismissing complaint where ADEA administrative charge was filed 321 days following receipt of his formal notice of. termination). Rather, "the limitation period begins to run on the date the employee receives definite notice of termination.'" Id. (quoting Economu v. Borg-Warner Corp., 829 F.2d 311, 315 (2d Cir. 1987)).

In this case, plaintiff received her formal notice of termination on March 29, 2001. [Def. Ex. 70]. The termination notice stated that she was no longer authorized to report to work after March 29, 2001. Id. Her administrative charge was filed on October 1, 2001, 186 days following her formal notice of termination. [Def. Ex. 70, 84]. Plaintiffs contention that the limitations period begins to run as of the effective date of her termination, April 12, 2001, is unsupported by the case law. Plaintiff also argues that, "[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered for the purposes of determining liability." [Doc. #53 at 6 (citing National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002)). In this case, plaintiff's termination of employment was a discrete act. Only incidents that took place within the timely filing period are actionable. Plaintiff fails to identify any evidence in the record to support her claim of a "continuing violation" after March

29, 2001, the dated she received formal notice of termination. See National Railroad Passenger Corp., 536 U.S. at 114.

Accordingly, summary judgment shall enter in favor of defendant CHRO on the Title VII claims set forth in Counts One arid Three.

CONCLUSION

Accordingly, defendants' Motion for Summary Judgment Counts One through Five [Doc. #45] is GRANTED.

This is not a recommended ruling. The parties consented to proceed before a United States Magistrate Judge [Doc. #20] on September 11, 2003, with appeal to the Court of Appeals.

Dated at Bridgeport, this 10th day of March 2005.

/s/
HOLLY B. FITZSIMMONS
UNITED STATES
MAGISTRATE JUDGE

78

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No. 07-424

Supreme Court, U.S.
FILED
DEC 19 2007
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In The

Supreme Court Of The United States

FEMI BOGLE-ASSE AI,
Petitioner,

v.

STATE OF CONNECTICUT, COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, CYNTHIA WATTS ELDER, LEANNE APPLETON AND DONALD NEWTON,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 2

ARGUMENT 8

I. REASONS TO DENY CERTIORARI 8

A. The Policy Behind Title VII is Not a Basis For Disregarding the Plaintiff's Failure to Raise the Issue Before the District Court or the Lack of Proof 8

B. There Is No Legal Basis For Equitable Tolling 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Allianz Insurance Co. v. Lerner, 416 F.3d 109 (2d Cir. 2005) 10

Bogle-Assegai v. CHRO, et al., 470 F.3d 498, (2d Cir. 2006) 3, 4, 5

Federal Statute

42 U.S.C. § 2000e-5 (e) 2

IN THE
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FEMI BOGLE-ASSEGAI

Petitioner

v.

STATE OF CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, CYNTHIA WATTS ELDER, LEANNE APPLETON AND DONALD NEWTON

Respondents

ON PETITON FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

COUNTERSTATEMENT OF THE CASE

In this action the petitioner, Femi Bogle-Assegai, asks this Court to review the Second Circuit Court of Appeals' decision affirming summary judgment for the respondents based upon the petitioner's untimely filing of her EEOC charge of discrimination under 42 U.S.C. § 2000e-5 (e). At issue is the Court of Appeals' rejection of the petitioner's assertion that she was entitled to the 300-day filing period.

The petitioner was fired from state employment as a Regional Manager with the Connecticut Commission on Human Rights and Opportunities ("CHRO") in 2001 because she fraudulently stole state time in excess of several thousand dollars. She was ultimately unsuccessful in her federal lawsuit because she: (1) failed to properly serve two individual defendants despite notice of the deficiency in service two years prior to the summary judgment ruling;[1] (2) failed to argue or offer any evidence before the District Court to dispute the 180 day filing period under section 42 U.S.C. § 2000e-5 (e); and (3) asserted an argument before the Court of Appeals premised

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[1] Petitioner's request for certiorari is limited to her Title VII claim. Petitioner does not seek certiorari regarding her claims pursuant to 42 U.S.C. §§ 1981 & 1983.

upon factual assertions not supported in the record or presented to the District Court.

The Court of Appeals relied on the following facts in reaching its decision. Defendants Watts-Elder, Newton, and Appleton all worked in management at the CHRO; Watts-Elder was the executive director, Newton was the chief of field operations, and Appleton was the fiscal administrative supervisor. Bogle-Assegai v. CHRO, et al., 470 F.3d 498, 499-500. Newton, in his role as chief of field operations, reminded all managers, Bogle-Assegai included, that they were expected to work their approved schedules. Id.

In early 2001, Newton began to question Bogle-Assegai's actual work times after he called her office one day at 10 am and was told by her staff that she had not yet arrived. Id. at 500. Although Bogle-Assegai later reported to Newton that she arrived at work at 9:30, not 8 as her schedule required, Newton questioned the issue further because Bogle-Assegai's staff had indicated that she had not yet arrived when he called at 10. Id. Newton then sought Appleton's help.

Bogle-Assegai had a designated parking space in the garage accessed by an electronic swipe card system. Id., at 500. Appleton, at Newton's direction, had obtained the swipe card history, which showed that Bogle-Assegai

arrived at work at 10:30 a.m. the day in question. Id. Further analysis of the swipe card history showed that Bogle-Assegai deviated from her approved schedule numerous times. Id. For example, for one period encompassing 68 workdays, Bogle-Assegai was more than one hour late 34 times and more than two hours late 15 times. Id.

Watts-Elder ordered an audit of all CHRO employees' times cards. Id. The audit revealed that Bogle-Assegai's time cards were contradicted by the swipe card history; she had been putting in for time that she did not work. Id. Watts-Elder initiated the disciplinary process, holding a formal hearing to give Bogle-Assegai an opportunity to submit a written explanation, but Bogle-Assegai's explanation did not address the time record discrepancies. Id. Watts-Elder sent Bogle-Assegai a letter on March 29, 2001 informing her that effective April 12, 2001, her employment was terminated for misuse of state time. Id. Bogle-Assegai filed a complaint with the Equal Employment Opportunity Commission on October 1, 2001 and received a right-to-sue letter. Id.

The defendants sought summary judgment before the District Court. The defendants claimed that the Title VII claims, the subject of this petition for certiorari, were not timely filed. Id., at 501. In support of their claim, the

defendants pointed to 42 U.S.C. § 2000e-5(e)(1), which requires that a complainant file a charge of discrimination with the EEOC within 180 days or, if the complainant files the discrimination charge with a local or state agency, within 300 days. Id., at 501-02. Bogle-Assegai filed only with the EEOC. The defendants argued that she had failed to file a timely complaint because October 1, 2001; was more than 180 days from the March 29, 2001 when Bogle-Assegai learned of her termination. Id. Bogle-Assegai did not agree and argued that March 29, 2001 was not the proper date to begin the limitations period. Id., at 502. Rather, Bogle-Assegai contended that the proper date to begin the limitations period was April 12, 2001, the effective date of her termination. Id.

The District Court granted summary judgment in favor of the defendants. It held that the date the termination decision was made and communicated to the employee (March 29, 2001) is the proper date to begin the limitations period. Id., at 503. It further held that Bogle-Assegai had filed only with the EEOC, so the 180 day limitation period applied. Id. Using March 29, 2001 as the operative date, the District Court held that Bogle-Assegai's claims were untimely. Id.

Before the District Court, Bogle-Assegai never raised any issue about the applicable filing period. She implicitly conceded that the correct period was 180 days because she did not argue that the 300 day period applied; instead she argued that the 180 days should start from a different date. Nowhere in her response to summary judgment did Bogle-Assegai suggest the existence of an enforceable work sharing agreement, nor did she rely upon any such agreement or make a claim for equitable tolling under any legal theory.

At the Court of Appeals, she raised for the first time the claim that there was a work sharing agreement between the EEOC and CHRO that designated each entity as dual agents for the other, and waived the 60 day exclusive jurisdiction of the deferral agency. According to Bogle-Assegai, the existence of the work-sharing agreement waiving the CHRO's exclusive jurisdiction to initially process all charges would result in automatic dual filing with the CHRO and EEOC. Relying on Tewksbury v. Ottaway Newspaper, 192 F.3d 322 (2d Cir. 1999), Bogle-Assegai argued that her claim was "initially" filed within the meaning of section 706 (e), 29 U.S.C. § 2000e-5 (e)(1).

However, conspicuously absent from Bogle-Assegai's summary judgment submission was any predicate evidence establishing crucial facts upon which

she now asks this court to rely. Petitioner's argument is premised entirely upon factual assumptions, conclusions, and speculations not supported by the record. For instance, the record does **not** show that Connecticut was a deferral state on October 1, 2001 (Petition, p. 17); that there existed a work sharing agreement between the CHRO and EEOC before and after October 1, 2001 (Petition, p. 16); that any lapse in a work sharing agreement in 2001 was technical and temporary (Petition, p. 14); that CHRO and EEOC continued to operate as though a work sharing agreement was in place after October 2001 (Petition, p. 14); that the EEOC actually transmitted Bogle-Assegai's October 1, 2001 complaint to the CHRO (Petition, p.18); and that any regulatory framework between the CHRO and EEOC was dismantled without notice (Petition, pp. 20-21).

Before the Court of Appeals, the defendants contested the existence of a valid work sharing agreement on the date Bogle-Assegai filed her EEOC charge and noted the lack of any evidence to support the allegations raised for the first time on appeal.

ARGUMENT

I. REASONS TO DENY CERTIORARI

This Court should deny the petition for certiorari because this case presents no conflict among the Courts of Appeal, it does not alleges that the lower court has departed from the accepted and usual course of judicial proceedings calling for this court's exercise of its supervisory powers, nor has it decided an important question of federal law that need be decided by this court.

This case is simply about a failure of proof by the petitioner to offer evidence in the record to support her claim. Now the petitioner asks this Court to engage in the type of speculation that the Court of Appeals refused to do, namely — to assume facts not in evidence and to address a new matter not raised before the district court.

The Court of Appeals rejected the petitioner's new argument about the applicable filing period for two reasons. First, she did not raise it before the district court. Second, there is no basis for equitable tolling.

A. The Policy Behind Title VII is Not a Basis For Disregarding the Plaintiff's Failure to Raise the Issue Before the District Court or the Lack of Proof.

Noting the absence of any argument before the District Court on the critical issue she now asserts, the court of appeals stated:

> It is clear that Bogle-Assegai did not make her present argument to the district court, although she had ample incentive to do so. Defendants' motion for summary judgment asserted that "there was no dual filing with both CHRO and EEOC (it was filed only with EEOC)," and thus that "plaintiff is not entitled to 300 days and her Title VII claim is untimely and must be dismissed . . . ." (Defendants' Summary Judgment Memorandum at 24 (emphases in original)). As described in Part I.B. above, Bogle-Assegai's response to this untimeliness contention made no reference to a work-sharing agreement, or to the concept of dual filing, or to any possibility that the applicable period was 300 days. Her memorandum argued only that defendants had used the wrong starting date for calculating the 180-day period and that the 180-day deadline had been met. (See Bogle-Assegai Memorandum Opposing Summary Judgment at 5 ("the court should not use the (March 29) date that the defendant indicates she 'would' be terminated; but rather the date that she was in fact . . . . effectively terminated[,] April 12").)
>
> At oral argument of this appeal, we asked counsel to review the record and inform this Court whether Bogle-Assegai had in fact argued in the district court that the 300-day

> filing period applied to her claims. In response, Bogle-Assegai's counsel submitted a letter stating that "counsel for Plaintiff-Appellant has made a diligent search of the record below and finds that with regard to the 300-day filing rule, Plaintiff-Appellant did not specifically argue the 300-day rule." (Letter from Bogle-Assegai's attorney Josephine Smalls Miller to this Court dated April 28, 2006 ("Miller Letter").)

Despite the lack of proof, the Court of Appeals nevertheless analyzed whether the argument about the applicable filing period simply presented an issue of law that required no additional fact finding. See Allianz Insurance Co. v. Lerner, 416 F.3d 109, 114 (2d Cir. 2005). Declining to address the merits of the argument raised on appeal precisely because it required the court to speculate about facts not in evidence, the Court of Appeals stated:

> Bogle-Assegai urges us nonetheless to entertain her present 300-day contention, arguing that we should take judicial notice that the EEOC regularly enters into such work-sharing agreements, that the existence of such an agreement presents an issue that is purely legal, and that CHRO should not be allowed to deny the existence of a work-sharing agreement on which she relied. These arguments are meritless.
>
> Bogle-Assegai's contention that "[t]his court may take judicial notice of the fact that the

> [EEOC] regularly enters into work-sharing agreements with state fair employment practices [sic]" (Bogle-Assegai reply brief on appeal at 2 (emphasis added) is not a sound basis for consideration of her new argument. Even if we were to take judicial notice of that practice in general, it would not ineluctably follow that there existed such an agreement between the EEOC and CHRO on October 1, 2001, in particular.
>
> Further, despite Bogle-Assegai's assertion that "the issue is purely legal and there is no need for additional fact-finding." (id. at 1 (internal quotation marks omitted)), the question of whether there existed a work-sharing agreement between the EEOC and CHRO on October 1, 2001, is a question of fact, not a question of law. Defendants state that no such agreement was in effect on that date (see Defendants' brief on appeal at 9 n.2); and if Bogle-Assegai had proffered any evidence that such an agreement did in fact exist on that date, there plainly would be a need for fact finding.

In sum, the remedial purposes of Title VII and the ability of the EEOC to enter into work sharing agreements are not undermined by this case. Bogle-Assegai's statement that she was victimized by a lapse in a work sharing agreement that she relied upon is not true. The ruling by the Court of Appeals is limited to the facts of the case premised upon the plaintiff's failure to raise the issue of the correct filing

period and the failure to support her claim by admissible evidence.

B. There Is No Legal Basis For Equitable Tolling

The Appellate Court further rejected Bogle-Assegai's assertion that she relied upon the existence of the work sharing agreement in filing her claim after 180 days had elapsed because there was no evidence to support this fact.

Petitioner chooses to characterize herself as the victim of circumstances described as a "dismantled" regulatory framework. (Petition pg. 21). This argument misses the mark because of the lack of evidence that Bogle-Assegai knew of a work sharing agreement and despite her best efforts to obtain relevant evidence and raise the issue before the District Court, her case was dismissed. That is not what happened. Bogle-Assegai never raised the issue of the 300 day filing period until her appeal before the Second Circuit and then made various representations of fact with no evidence in the record to support her assertions. Again, the Court of Appeals noted the inconsistency:

> In sum, faced with summary judgment motion expressly asserting that her charge had not been dually filed with the state agency and that the 300- day filing period

> therefore did not apply to her claims, Bogle-Assegai had every incentive and opportunity to contest that argument. She made no argument to the district court in opposition. And in arguing to this Court that the 300 day period is applicable, she proffered no reason for her failure to make that argument in the district court and has pointed to no evidence that would support her factual premises.

(App. p. 31).

CONCLUSION

There is no compelling legal issue to justify the High Court hearing this case. The petitioner did not present her argument about the 300 day limitation to the District Court. Because she did not present it to the District Court, she never submitted the necessary evidence to even make the argument. The Court of Appeals, after reviewing the petitioner's argument from every angle, held that the lack of evidence in the record to support her new argument about the 300 day limitation was fatal. There are no important policies implicated in this case. This case is ultimately about the petitioner's failure put the necessary evidence in the record to support her argument. Based upon the record presented to the Court of Appeals, there was no error.

Respectfully submitted,

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